71-7214

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of The United States

OCTOBER TERM, 1971

EDWARD EUGENE FREEMAN, Petitioner

versus

COMMONWEALTH OF VIRGINIA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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November 29, 1971

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

EDWARD EUGENE FREEMAN, PETITIONER

vs:

COMMONWEALTH OF VIRGINIA; RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of
Appeals for the Fourth Circuit

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Edward Eugene Freeman, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia, at Richmond, entered September 1, 1971, affirming his conviction under Virginia Code Section 29-144.2, and that on hearing the judgment of conviction be reversed.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is not reported. A copy of the opinion is printed in Appendix A hereto, infra, page 18.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on September 1, 1971. This court has jurisdiction because the Supreme Court of Virginia has decided a federal question of substance not in accord with applicable decisions of this court. This court has jurisdiction under U.S.C.A. 28, Section 1257 because Virginia Code Section 29-144.2 is invalid. This invalidity results from its repugnancy to the Constitution of the United States, and the decision of the Supreme Court of Virginia is in favor of its validity.

QUESTIONS PRESENTED

1. Whether Virginia Code Section 29-144.2 raises a rational connection between the facts proved and the facts presumed, or whether there be any rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience, and whether the inference raised by this statute is not so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule

governing the procedure of courts.

2. Whether Virginia Code Section 29-144.2 constitutes an unconstitutional deprivation of freedom without due process of law because of its reliance upon a presumption based upon another presumption.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"Code Section 29-144.2. Killing deer or elk by use of certain lights; acts raising presumption of attempt to kill. -- Any person who kills or attempts to kill any deer or elk between a half hour after sunset on any day and a half hour before sunrise the following day by use of a light attached to any vehicle or a spotlight or flashlight shall be guilty of a misdemeanor and shall be punished by a fine of not less than fifty dollars nor more than two hundred and fifty dollars or by confinement in jail for not less than thirty days nor more than sixty days, either or both. The flashing of a light attached to any vehicle or a spotlight or flashlight from any vehicle between a half hour after sunset on any day and a half hour before sunrise the following day by any person or persons, then in possession of a rifle, shotgun, pistol, crossbow,

or bow and arrow or speargun, without good cause, shall raise a presumption of an attempt to kill deer or elk in violation of this section. Every person is or on any such vehicle shall be deemed a principal in the second degree and subject to the same punishment as a principal in the first degree.

This section shall not apply to persons duly authorized to kill deer according to the provisions of Sec. 29-145.1. (1962, c. 520; 1970, c. 79.)"

"AMENDMENT V. - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"AMENDMENT XIV. - (1868) Section 1. All persons born or naturalized in

the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced

in the proportion which the number of such male citizens shall bear to the whole number of male citizens' twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt

or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

STATEMENT OF THE CASE

The appellant was charged by the game wardens of Nottoway County with violation on or about the 3rd day of June, 1970 of Code Section 29-144.2. Subsequently the defendant was tried in the County Court and found guilty. From which finding he appealed to the Circuit Court of Nottoway County and requested trial by jury. On the 9th day of November, 1970 a jury was empaneled and the defendant was tried. The evidence and proceedings at the trial of Edward Eugene Freeman on the 9th day of November, 1970 were stipulated by counsel, and are as follows:

1. Mr. R. E. Parsons, who lives at Route 3, Blackstone, on Highway No. 153, in Nottoway County about three miles south of the Amelia County line, testified for the Commonwealth. He stated that about 11:15 P. M. on the 3rd day of June, 1970, he was in his kitchen in his residence which is a short distance from Highway

153 in Nottoway County, when he saw a car moving slowly north at 15 to 20 miles per hour and a spotlight was being flashed from the car which played upon his barn, silo and field. Mr. Parsons got in his automobile and followed the other car. He next noticed a car coming back in the opposite direction and recognized it to be the same automobile by reason of the noise. He noticed that it had a North Carolina license tag.

2. Mr. Parsons then returned to his residence and called the Sheriff's office. A little later, still at his home, Mr. Parsons heard what sounded to be a gun shot and he noticed that the car came back again and that the car stopped. Mr. Parsons again left his residence in an automobile and came upon the vehicle with the North Carolina license about 250 or 300 yards from his house on the highway. Three male persons were seen by him at that time scrambling back into the automobile. Mr. Parsons pulled up beside the car and asked what they were doing. The driver replied they had car trouble and Mr. Parsons told them they were spotlighting deer. With this the other car sped away and Mr. Parsons attempted to head them off, but the other car would not allow him to pass so he gave chase. Mr. Parsons stated that there were three men in the car at this time and that he definitely saw a long firearm and a spotlight in the vehicle. The three men were all in the front seat. After pursuing the car for mile or more Mr. Parsons

noticed a police type vehicle approaching from the rear so he pulled over and allowed the police vehicle to pass and pursue the North Carolina automobile.

3. Mr. Parsons stated that he got a good look at the driver of the automobile and that neither Mr. Freeman, the defendant, nor a 15 year old juvenile later apprehended by Mr. Powell, was the driver of the vehicle. He also stated that he did not know any of the three occupants. He identified Freeman as one of the three persons at the car when they scrambled into it and fled.

4. Mr. Jesse Powell, Deputy Sheriff of Nottoway County, testified for the Commonwealth. He stated that on the night in question he had been notified to go to the location of Mr. Parsons' residence in the Spainville neighborhood, Nottoway County, on Highway 153. When he arrived at the destination sometime shortly after midnight on the day in question, two automobiles were in the road. He saw them proceed for some distance down the road side by side.

5. Mr. Powell stated that he pulled around Mr. Parsons' vehicle, and gave chase to the car bearing North Carolina license plates, going north on Highway 153 into Amelia County. He stated that he pursued the vehicle at speeds up to 75 miles per hour and was unable to get around the other car. It turned right

on Highway 708 leading east toward Mannboro, Virginia and pursued the vehicle along this hard surface secondary road for 4 or 5 additional miles, losing sight of the vehicle momentarily from time to time. Powell did not meet or pass or see any other cars on the route of the chase.

6. Officer Powell stated that the other vehicle was unable to negotiate the 90° turn at Mannboro and ran off the road in the ditch and stopped. He stated that the driver of the vehicle fled on foot and was not identified by him. He apprehended the defendant, Freeman, and the 15 year old juvenile who were in the automobile at the time. Officer Powell stated that he was under the impression that Freeman was in the middle and the juvenile on the right side, both on the front seat. Officer Powell did not find a gun or light in the vehicle. Later after arresting the defendant and returning him to Headquarters, he returned to the vicinity of the alleged violation and searched for a gun and light. About two miles off Highway 153 on Highway 708 along the route of the chase he came upon a rifle lying on the edge of the highway. It was a 30-30 Winchester Lever Action firearm. No light was found.

7. Officer Powell also located and viewed a doe deer which appeared to have been killed by a firearm bullet wound, a short distance off Highway 153, in a field near Parsons' house. He stated that

the carcass of the deer was still warm.

8. Later two 30-30 spent cartridges were found in the automobile from which the defendant Freeman was emerging when apprehended.

9. Testimony of Game Warden Phelps and Johnson indicated that the spent cartridges had been sent to F.B.I. Laboratory for examination, and the Commonwealth offered as a witness, T. P. Smith, F.B.I. Ballistic expert. The parties stipulated that the expert would have testified that the cartridge in his opinion had been fired from the 30-30 rifle found by Officer Powell upon the highway.

No testimony was offered as to the registered owner of the automobile nor the registered owner of the firearm, and no further testimony was offered as to the identity of the party designated by Mr. Parsons and Officer Powell as the driver of the vehicle.

Upon completion of the testimony of the Commonwealth's witnesses the defendant moved the Court to strike the evidence on the grounds that the Commonwealth had failed to prove the facts necessary to sustain a verdict of guilty, and upon the further grounds that the statute under which the defendant was charged was, in fact, unconstitutional. The Court overruled the motion of the

defendant and the defendant stated his exceptions and requested that the points raised be saved throughout the proceedings.

The defendant offered no evidence, whereupon the jury retired and rendered its verdict, "We the jury, on the issue joined, unanimously find the defendant, Edward Eugene Freeman, guilty, and fix his punishment by a fine of $125.00, and confinement in jail for a period of 30 days. G. D. Harper, Foreman." Attorney for the defendant moved that the verdict be set aside upon the same grounds as stated in a motion to strike. This motion the court also overruled.

Wherefore the Court pronounced the judgment of guilty and sentenced the defendant to serve 30 days in jail and pay a fine of $125.00, together with costs of the proceedings.

Upon the rendering of the verdict by the Circuit Court a petition of appeal was filed with the Supreme Court of Virginia, at Richmond, which included the following Assignments of Error:

1. The Court erred in overruling the motion of the defendant to strike the evidence of the Commonwealth on the grounds:

(a) That the Commonwealth failed to prove the necessary facts to constitute

a case, under the statute, upon which a conviction could properly be upheld.

(b) That the statute under which the defendant was charged, namely, Code Section 29-144.2, is unconstitutional.

2. The Court erred in refusing to set aside the verdict and dismiss the charges against the defendant upon the same grounds and for the same reasons as set forth in Number 1 above relating to the motion to strike.

The petition of Edward Eugene Freeman for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Nottoway County was considered and refused by the Supreme Court of Virginia on September 1, 1971, the Court being of the opinion that there was no reversible error in the judgment complained of, the effect of which was to affirm the judgment of the said Circuit Court.

We seek review of the affirmance of the conviction and sentence and outright reversal of the conviction.

REASONS FOR GRANTING THE WRIT

1. Statute 29-144.2, presents a patent violation of the Fifth and Fourteenth Amendments, as it deprives a person convicted under the statute of the due process of law. As the Supreme Court

of the United States has said in the famous case of Tot v. United States, 319 US 463, 63 S Ct. 1241:

> "But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. The question is whether, in this instance, the Act transgresses those limits. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts."

In the incident case just such an arbitrary presumption has been invoked, to-wit: The mere flashing of a light "without good cause" from a car in which a firearm is present is presumed to be sufficient evidence for a conviction of hunting deer at night.

2. In addition, there is an improper basing of an inference upon an inference or presumption upon presumption, to-wit: Those parties who are in such a vehicle, whether or not they are the driver, the flasher of the light, the holder of the firearm or simply sitting in the car, are conclusively deemed to be principals in the second degree, and subject to the same punishment as a principal in the first degree. A leading case reciting the law against basing an inference upon an inference is Eitel v. Times, Inc., 221 Or 585, 352 P2d485, 5 ALR 3d 86. The ALR Annotation gives a lengthy and extensive summary of the cases upholding this principle of law, which authorities are too numerous to mention.

It would appear that the presumption that Mr. Freeman was guilty as a principal in the second degree of hunting deer at night based upon the fact that he was an occupant of a car which contained a firearm and a flashing light, would be such a presumption based upon a presumption so as to deny him due process of law under the Fifth and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Gravatt and Gravatt

By _____
William Moncure Gravatt, Jr.
P. O. Box 71
Blackstone, Virginia
23824,
Of Counsel for
Petitioner

I, William Moncure Gravatt, Jr., an attorney at law, qualified to practice in the Supreme Court of the United States, residing in the Town of Blackstone, Virginia, do certify that in my opinion the judgment complained of in the foregoing Petition should be revieved by the Supreme Court of the United States.

_____
William Moncure Gravatt, Jr.,
Of Counsel for Petitioner

Gravatt and Gravatt
P. O. Box 71
Blackstone, Virginia,
Counsel for Petitioner

I hereby certify that five copies each of the foregoing Petition have been mailed on the 29th day of November, 1971 to the Honorable Andrew P. Miller, Attorney General of Virginia, at his office in the Supreme Court Building, Richmond, Virginia, and to Honorable George S. Cummins, Commonwealth's Attorney for Nottoway County, Virginia, at his office at Blackstone, Virginia.

William Moncure Gravatt, Jr.

I, William Moncure Gravatt, Jr, certify that notice of this appeal was duly filed with the Clerk of the Supreme Court of Virginia on November 4, 1971, and a copy of said notice was, in accordance with Rule 33, duly served on Honorable Andrew P. Miller, Attorney General of Virginia, at his office in Richmond, Virginia, and upon Honorable George S. Cummins, Commonwealth's Attorney for Nottoway County at his office in Blackstone, Virginia, by mailing a copy to each on the 4th day of November, 1971.

William Moncure Gravatt, Jr.

APPENDIX A

Copy of opinion of Supreme Court of Virginia:

"VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 1st day of September, 1971.

The petition of Edward Eugene Freeman for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Nottoway County on the 9th day of November, 1970, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:
Howard G. Turner,
Clerk

By: /s/ Allen L. Lucy,
Deputy Clerk".